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MAR 19 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1264

In The
Supreme Court of the United States
October Term, 1983

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ILLINOIS COMMERCIAL MEN'S ASSOCIATION,
Appellant,

vs.

BOARD OF EQUALIZATION,
STATE OF CALIFORNIA,
Appellee.

—o—

On Appeal from the Supreme Court of the State of California

—o—

MOTION TO DISMISS OR AFFIRM

—o—

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QUESTION PRESENTED

Is there a substantial federal due process question regarding California's jurisdiction to tax the California insurance business of an Illinois insurer which conducted its California solicitations by mail and advertising and which had independent contractors present in California as its representatives for claims verification, investigation, litigation and settlement?

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ILLINOIS COMMERCIAL MEN'S ASSOCIATION,

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Appellee.

On Appeal from the Supreme Court of the State of California

MOTION TO DISMISS OR AFFIRM

Appellee, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, hereby moves this Court to dismiss this appeal or to affirm the decision of the California Supreme Court on the ground that this case does not present a substantial federal question.

INTRODUCTORY STATEMENT

The California Supreme Court has held that the State of California had jurisdiction to apply its insurance tax upon appellant Illinois Commercial Men's Association (hereinafter "ICMA") for the privilege of conducting its California insurance business.[1] The case was tried on a stipulation of facts (cited herein as "Stip."). Appellant ICMA was an insurance company organized and with its home office outside California. Stip. ¶ 1. Through the years at issue ICMA solicited California death, dismemberment and disability indemnity insurance business through hundreds of thousands of direct mail solicitations to Californians and some advertising in national publications. Stip. ¶¶ 3, 21-26. Although appellant ICMA had no representatives physically present in California to assist in its solicitation of business, ICMA had independent contractor representatives (including investigators, doctors, lawyers, and an investigator/adjuster) who were physically present in California and who represented ICMA regarding claims verification, investigation, litigation and settlement (Stip. ¶¶ 28, 33, 34, 37, 39) and (possibly) some policy applications investigation (Stip. ¶ 31). Approximately ten percent of ICMA's California claims were investigated by ICMA representatives who were

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1 The California decision is reported as *Illinois Com. Men's Assoc. v. State Bd. of Equalization* (1983) 34 Cal.3d 839, 671 P.2d 349, 196 Cal.Rptr. 198; citations to that decision will be to the official reports and to appendix A of appellant's jurisdictional statement (J.S. App. A). That decision also rejected the claims of another insurer, National Liberty Life Insurance Company, which has filed a separate jurisdictional statement with this Court (No. 83-1251).

physically present in California; over the years in issue more than one-third of the hundreds of ICMA claims investigated in California went through two levels of California investigation, with the final ICMA California representative having full authority to settle the claims. Stip. ¶¶ 33-34, 36.

ARGUMENT

I. The California Supreme Court Has Propertly Distinguished National Bellas Hess Based On ICMA's Claims Investigation And Settlement Activities In California.

The California Supreme Court, applying the due process jurisdictional standard stated by this Court in *National Bellas Hess v. Department of Revenue* (1967) 386 U.S. 753, 756, has held that California has jurisdiction to tax ICMA because there is "'"some definite link, some minimum connection "'" between California and ICMA and because California has given ICMA protection for which it can ask return. 34 Cal.3d at 846, 850; J.S. App. A, A-6, A-13.

Unlike the current case, *National Bellas Hess* involved both the due process clause and the commerce clause, for it involved the catalog sale of general merchandise rather than the business of insurance.[2] This Court's holding in

2 Insurance tax cases (such as the one at bar) do not involve the commerce clause: the McCarran-Ferguson Act (15 U.S.C.A. §§ 1011-1015) has removed all commerce clause restrictions from the state regulation and taxation of insurance business. *Western & Southern L.I. Co. v. Bd. of Equalization* (1981) 451 U.S. 648, 653.

National Bellas Hess was made on the basis that "[a]*ll* of the contacts which National does have with the State are via the United States mail or common carrier." (386 U.S. at 754 (emphasis added).

The California Supreme Court has distinguished *National Bellas Hess* from the current case on the clear basis that ICMA had many representatives actually in California acting on its behalf in numerous claims investigations during the years at issue. 34 Cal.3d at 849-52, J.S. App. A, A-12 - A-15. (The status of these representatives as independent contractors is discussed below.) The California Supreme Court recognized these claims activities as being a "function crucial to the administration of the insurance policies covering California residents" and held as follows:

> "We hold, therefore, that the character and extent of plaintiffs' activities in this state were sufficient to form the 'definite link' and 'minimum connection' required to justify imposition of the tax, and that plaintiffs received the benefit of this state's law through the protections afforded their agents in California." *Id.* at 850; J.S. App. A, A-13 (footnote omitted.)[3]

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3 Since the California Supreme Court decided that ICMA's claims representatives in California provided sufficient nexus, that court did not find it necessary to weigh the activities conducted by doctors and lawyers who were paid by ICMA to act on its behalf in California. Stip. ¶¶ 37, 39. The California Supreme Court noted that under its determination it did not find it necessary to determine also whether health and safety benefits which California provided to ICMA's insureds also benefited ICMA. *Id.* n. 6. See *Armed Forces Co-Op., etc. v. Dept. of Ins.* (1980) Wyo., 622 P.2d 1318, 1347, *appeal dismissed* (1982) 454 U.S. 1130.

It is respectfully submitted that the California Supreme Court has properly distinguished this Court's *National Bellas Hess* decision in reaching this holding.

II. Appellant ICMA Attempts To Rewrite National Bellas Hess And Other Prior Decisions Of This Court To Create Support For ICMA's Position.

A. ICMA has rejected the basic stated proposition in National Bellas Hess that all contacts with the taxing state in that case were through the mail or common carrier.

Appellant ICMA's jurisdictional statement is founded upon a series of misinterpretations of United States Supreme Court decisions. Perhaps the most important (and most flagrant) is ICMA's use of the dissenting opinion in *National Bellas Hess* in an attempt to reframe that case's majority opinion.

As noted above, the majority opinion in *National Bellas Hess* was on the explicitly stated basis that "[a]*ll* of the contacts which National does have with the State are via the United States mail or common carrier." 386 U.S. at 754 (emphasis added). A complete review of the *National Bellas Hess* record reveals no evidence of any contacts with the taxing state other than via the United States mail or common carrier; the entire point of that litigation was to determine the validity of an Illinois statute which framed tax collection jurisdiction solely upon soliciting orders "'by means of catalogues or other advertising. . . .'" *Id.* at 755.

In *National Bellas Hess* the three dissenting justices (Justices Black, Douglas, and Fortas) stated a belief that

"a realistic approach to the facts of appellant's business" would have led to an upholding of the tax in issue. 386 U.S. at 760. They noted that the affidavits upon which the case was tried did not disclose the details of the company's credit operations in Illinois, but they were willing to look to materials outside the record and to make certain *assumptions* that such credit business would lead to local activities. *Id.* at 761-62.[4] On the basis of these materials and assumptions the dissenters concluded that "Bellas Hess is not simply using the facilities of interstate commerce to serve customers in Illinois." *Id.* at 762.

The majority in *National Bellas Hess* was unwilling to make these assumptions, basing its holding on the statement of fact that "[*a*]*ll* of the contacts which National does have with the State are via the United States mail or common carrier." *Id.* at 754 (emphasis added). The majority opinion's only mention of any potential follow-up activities was to note that under the facts presented to the Court National Bellas Hess did not have in Illinois any "'type of representative . . . to service merchandise it sells . . . .'" *Id.* Thus, contrary to ICMA's argument, the majority did not recognize the existence of any collateral activities within Illinois and then decide to treat them as insignificant. None of the statements within the majority opinion is consistent with there hav-

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4 It is quite clear from footnote 2 of the *dissenting* opinion in *National Bellas Hess* that the information the dissenters relied upon concerning "NBH Budget Aid Credit", "Budget Aid Family Insurance" and "charge account" and "credit purchases" forms was derived from a catalog which was not part of the record before the Court.

ing been *any* collateral activities by *any* National Bellas Hess representatives within Illinois.

Now ICMA attacks the California Supreme Court's treatment of *National Bellas Hess* on the basis that the California Supreme Court has not recognized the "collateral activities" from the dissenting opinion which the *National Bellas Hess* majority itself chose not to recognize. J.S. 8-9, 13. With regard to *National Bellas Hess*, ICMA is after the best of all worlds: the *facts* which the dissent wanted to apply but which were rejected by the majority, and the *result* which the majority reached without those facts and which the dissent thought should be avoided by application of those facts. *ICMA's* treatment of *National Bellas Hess* is inconsistent with both the majority and dissenting opinions in that case.

B. As in the Scripto and Standard Pressed Steel cases, the present taxpayer (ICMA) exploited the California insurance market and used California representatives for an integral element of its California insurance business.

ICMA's misreading of *National Bellas Hess* carries over to its treatment of *Scripto v. Carson* (1960) 362 U.S. 207.[5] The California Supreme Court correctly has relied upon *Scripto* for the proposition that for tax jurisdictional purposes the activities of independent contractors should

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5 To the extent ICMA argues that *Scripto* must be read in the light of the additional facts (involving supposed activities within the taxing state) which ICMA ascribes to *National Bellas Hess*, ICMA's argument is answered by the discussion of *National Bellas Hess* immediately preceding this argument.

be treated as equivalent to activities of employees. ICMA, in apparent agreement with this proposition, appears to distinguish *Scripto* on the purported bases that in *Scripto* there was an in-state, systematic exploitation of the market and that the activities carried out by the independent contractors in this case were allegedly not as jurisdictionally important as the sales activities in *Scripto*. While at one point ICMA recognizes (J.S. 9) that "some claims will inevitably prompt further investigation," ICMA attempts to downplay the claims investigation and settlement activities of its own representatives in California on the basis that ICMA *tries* to resolve most claims questions through other means. See J.S. 12, 13, 18.

Before discussing the essential nature of ICMA's California claims activities, it should be noted that although ICMA's claims investigators did not directly solicit ICMA's new business in California, over the years at issue ICMA certainly exploited the California market by the direct mailing of hundreds of thousands of solicitations directly to California prospects. Stip. ¶ 26. In an earlier case involving the regulation of mail-order insurers, the California Supreme Court recognized that through such mail solicitations an insurer "is for all practical purposes soliciting insurance here as manifestly as if it were to carry on such solicitation through representatives physically present within this state." *People v. United National Life Ins. Co.* (1967) 66 Cal.2d 577, 593, 58 Cal.Rptr.

599, 609, 427 P.2d 199, 209, *appeal dismissed* 389 U.S. 330.[6] Thus the California market was purposely exploited by ICMA; ICMA's California solicitations gave rise to the insurance business which included the hundreds of claims which ICMA's representatives investigated and settled in California over the years in issue. See Stip. ¶¶ 33, 34, 36. This is far from the isolated investigation in the hypothetical case posited on page 17 of ICMA's jurisdictional statement. There is nothing in the *Scripto* decision that indicates that independent contractors must take a direct role in solicitation efforts in order for their activities to have jurisdictional weight.

In acknowledging that "some claims will inevitably prompt further investigation" in the state where the claims arose (J.S. 9), ICMA must recognize that without sound claims investigation and settlement procedures ICMA's insurance business could not long survive in the form disclosed in the record. In refusing to distinguish *Scripto*, the California Supreme Court in the present case recognized that "the investigation and settlement of claims is an integral and crucial aspect of the business of insurance." 34 Cal.3d at 849; J.S. App. A, A-12.[7] This Court

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6 Although *National Bellas Hess* held that conducting a general business *solely* by mail or common carrier could not by itself establish taxing nexus, there was no holding that mail-order solicitations had no constitutional significance at all. Moreover, in an insurance tax case such as this, in in which only the due process clause is applicable (see note 2 above), weight should be given to all activities within the state even if some of those activities are accomplished by means of instrumentalities of interstate commerce.

7 It is the entire privilege of carrying on the business of insurance that is being taxed here, not merely the privilege of carrying on insurance solicitations or sales. See *Carpenter v. People's Mut. Life Ins. Co.* (1937) 10 Cal.2d 299, 302, 74 P.2d 508, 510.

has recently dismissed a mail-order insurer's appeal from a decision wherein the Wyoming Supreme Court recognized that the claims procedure is "a hugely important aspect of any insurance business." *Armed Forces Co-Op, etc. v. Dept. of Ins.* (1980) Wyo., 622 P.2d 1318, 1345, *appeal dismissed* (1982) 454 U.S. 1130. The constitutional importance of whether any claim investigation is carried out in the taxing state is emphasized by the specific mention of the *absence* of such activities in cases where this United States Supreme Court has *denied* a state's jurisdiction to tax insurers. *See, e.g., Connecticut General Life Ins. Co. v. Johnson* (1938) 303 U.S. 77, 82; *State Bd. of Ins. v. Todd Shipyards* (1962) 370 U.S. 451, 454-55 (both discussed further below).

Contrary to ICMA's current arguments, there is nothing in the record of the case at bar to indicate that ICMA's California claims investigation and settlement activities were not part of a (using ICMA's phrase) "systematic plan of action" (J.S. 14) for carrying on its substantial insurance business in California. The fact that ICMA handled most of its claims without involving its California representatives or that ICMA wished that it could handle all claims without such involvement does not change the fact that the California investigations by ICMA's representatives were an integral and crucial part of the California insurance business that California was taxing. The fact that *Scripto v. Carson, supra,* and *Standard Pressed Steel Co. v. Wash. Revenue Dept.* (1975) 419 U.S. 560 both involved representatives who at least in part were in-

volved in generating sales of goods[8] does not mean that ICMA's California insurance claims investigation and settlement activities were not significant in establishing the minimum contacts necessary for due process tax jurisdiction.

C. In its arguments regarding the importance of claims investigation and settlement ICMA further displays its unwillingness to accept the plain language of this Court's decisions involving insurance companies.

ICMA continues to display a remarkable unwillingness to accept the plain language of this Court's decisions when ICMA attempts to establish that claims adjustment activities supposedly have played no significant role in this Court's previous insurance cases. For example, ICMA's discussion of *State Bd. of Ins. v. Todd Shipyards* (1962) 370 U.S. 451 is based on a presumption that claims would be investigated in Texas, whereas this Court, in addition to noting that "the insurance companies carry on no activities within the state of Texas" (*id.* at 453), explicitly stated that "[t]he insurers . . . do not investigate risks or claims in Texas." *Id.* at 454-55. Similarly, there are statements in both *St. Louis Compress Co. v. Arkansas* (1922) 260 U.S. 346 (cited J.S. 15)[9] and *Allgeyer*

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8 In *Standard Pressed Steel* the permanent representative within the taxing state engaged both in consulting the major customer regarding its anticipated needs and in following up regarding any post-delivery difficulties. 419 U.S. at 561.

9 "[H]ere no act was done within the State . . . ." *Id.* at 349.

v. Louisiana (1897) 165 U.S. 578 (cited J.S. 16)[10] that rule out ICMA's proposed presumption that claims investigations occurred within the taxing states in those cases. Even more bizzare is ICMA's treatment (J.S. 16) of *Connecticut General Life Ins. Co. v. Johnson* (1938) 303 U.S. 77 and *Compania de Tabacos v. Collector* (1927) 275 U.S. 87. In *Connecticut General* this Court took pains in denying tax jurisdiction to note that the Connecticut reinsurance in that case "involves no action taken in California, *even the settlement and adjustment of claims*" (*id.* at 82) (emphasis added); in *Compania de Tabacos* this Court founded jurisdiction on the basis that one of the insurance companies would have agents active in the taxing jurisdiction "with respect to settlement of losses . . . ." *Id.* at 98. In desperation ICMA argues without support that the question of claims investigations were not crucial in those cases, "but rather the cases turned on the criteria of actual physical presence . . . ." J.S. 16. Assuming that "actual physical presence" was determinative in those cases, at least in significant part it was the actual physical presence (or absence) of claims investigators. In the case at bar the record is clear that ICMA had claims investigators physically present and active in California and that one of those representatives even had the power to enter into final settlements of claims without further approval from

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10 "[T]he only thing that the facts show was done within that State was the mailing of a letter or notification [describing cotton to which the open marine insurance policy would attach] . . . which was done after the principal contract had been made." *Id.* at 587.

ICMA. Stip. ¶¶ 33, 34.[11] As established above (pp. 7-8), the fact that these representatives were independent contractors rather than formal employees of ICMA can make no difference as to determining whether ICMA was physically present in California.

III. This Court Recently Has Rejected Another Appeal Which Presented The Same Issue.

The California Supreme Court discusses three decisions from other states where "the power of a state to tax mail order insurers was upheld even though the activities of the insurers in the taxing state were similar to or less extensive than those of plaintiffs." 34 Cal.3d at 850-51; J.S. App. A, A-13 - A-15. All three of these decisions were presented to this Court, and this Court declined to review all three. *Ministers Life & Casualty Union v. Haase* (1966) 30 Wis. 2d 339, 141 N.W.2d 287, *appeal dismissed* 385 U.S. 205; *National Liberty Life Ins. Co. v. State of Wisconsin* (1974) 62 Wis.2d 347, 215 N.W.2d 26, *cert. denied and appeal dismissed* (1975) 421 U.S. 940, 946; *Armed Forces Co-Op., etc. v. Dept. of Insurance* (1980) Wyo., 622 P.2d 1318, *appeal dismissed* (1982) 454 U.S. 1130. Thus this Court's latest exposure to this issue was in 1982 in the *Armed Forces Co-Op.* case, wherein the Wyoming Supreme Court had held that Wyoming had due process jurisdiction to tax and regulate a Kansas insurer who had con-

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11 As noted by the California Supreme Court, 34 Cal.3d at 848, J.S. App. A, A-9, ICMA also apparently had its California representatives sometimes conduct investigations regarding applications for insurance. See above at n. 3 regarding doctors and lawyers that ICMA also paid to act on its behalf in California.

siderably less overall contacts with Wyoming than ICMA has with California in the case at bar. It is respectfully submitted that no constitutionally significant differences are presented in the current case which would give cause for this Court's now giving plenary consideration to the issue.

CONCLUSION

For the reasons given above, it is respectfully submitted that this Court should dismiss the appeal or, in the alternative, affirm the decision of the California Supreme Court.

DATED: March 16, 1984.

Respectfully submitted,

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